No. 11-30936

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HORNBECK OFFSHORE SERVICES, LLC; BEE MAR-WORKER BEE, LLC; NORTH AMERICAN FABRICATORS, LLC; BEE MAR, LLC; OFFSHORE SUPPORT SERVICES; ET AL,

Plaintiffs-Appellees,

v.

KENNETH SALAZAR, SECRETARY, DEPARTMENT OF INTERIOR, also known as Ken Salazar; UNITED STATES DEPARTMENT OF INTERIOR; BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT; and MICHAEL R. BROMWICH, in his official capacity as Director of that Bureau,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUSIANA
No. 10-CV-1663 (Hon. Martin L. C. Feldman)

REPLY BRIEF FOR THE FEDERAL DEFENDANTS

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INTRODUCTION AND SUMMARY OF ARGUMENT

The district court found the government in civil contempt and awarded attorneys' fees to Hornbeck on that basis, not because the government had violated any term of its preliminary injunction order, but because of what the district court viewed as "dismissive conduct." The district court's contempt theory, which Hornbeck now defends, ignores the firmly established limitations on the judiciary's contempt power and the separation of powers principles behind them.

Civil contempt is an inelastic doctrine that does not allow a court to impose sanctions when it merely disagrees with a party's purported "dismissive conduct." Civil contempt will lie only if the putative contemnor has violated an order that is clear and unambiguous, *Int'l Longshoremen's Ass'n v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 76 (1967), and the violation has been proved by "clear and convincing evidence," *Martin v. Trinity Indust.*, 959 F.2d 45, 47 (5th Cir. 1992). As the Supreme Court has emphasized, the "potent weapon" of contempt sanctions may not be "founded upon a decree too vague to be understood." *Int'l Longshoremen's Ass'n*, 389 U.S. at 76. Put another way, "the party enjoined must be able to ascertain from the four corners

of the order precisely what acts are forbidden." *Drywall Tapers & Painters of Greater N.Y., Local 1974 v. Local 530 of Operative Plasterers & Cement Masons Int'l Ass'n*, 889 F.2d 389, 395 (2d Cir. 1989).

Here, the preliminary injunction order was clear, but limited only to enforcing the May Directive. R:2247. Interior did not enforce the May Directive after the district court's order, and ultimately rescinded it. The order does not prohibit Interior from issuing a new suspension directive; does not prohibit Interior officials from discussing a new suspension directive; and does not require Interior to seek the district court's permission before issuing a new suspension. The asserted acts or failures upon which the district court based its contempt finding against Interior do not violate any clear and unambiguous directive in the preliminary injunction order in a manner that could conceivably be held contumacious under governing law. The district court erred.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's decision to invoke its inherent contempt power. U.S. Br. at 18. Hornbeck disagrees and argues that review is for an abuse of discretion, but, even under that standard, review of underlying legal questions is *de novo*. *See Am.*

Airlines, Inc. v. Allied Pilots Ass'n., 228 F.3d 574, 578 (5th Cir. 2000) (abuse-of-discretion review of civil contempt orders involves *de novo* review of the underlying legal rulings). The question presented here is whether the preliminary injunction order prohibited the conduct upon which the district court grounded its contempt finding. U.S. Br. at 18. As this Court previously has held, "the interpretation of the scope of [an] injunctive order[] is a question of law to be determined by the independent judgment of this Court." *Drummond Co. v. Dist. 20, United Mine Workers of Am.*, 598 F.2d 381, 385 (5th Cir. 1979); *see also Latino Officers Ass'n City of N.Y. v. City of New York*, 558 F.3d 159, 164 (2d Cir. 2009). Thus, even under an abuse of discretion standard, because the question before this Court is a legal one, review is *de novo*.

In any event, because "the threshold for the use of inherent power sanctions is high," review under the abuse of discretion standard is particularly probing in contempt cases. *See Crowe v. Smith*, 151 F.3d 217, 226 (5th Cir. 1998); *see also United States v. Local 1804-1*, 44 F.3d 1091, 1095-96 (2d Cir. 1995) ("[T]his Court's review of a contempt order for abuse of discretion is more rigorous than would be the case in other situations in which abuse-of-discretion review is conducted."). Under

the facts and circumstances of this case, the district court abused its discretion in awarding attorneys' fees to Hornbeck without finding a clear violation of a "definite and specific" existing court order.

ARGUMENT

As explained in the opening brief, the district court erred when it held the government in civil contempt for what it deemed to be Interior's "dismissive conduct" rather than because Interior had violated the terms of its preliminary injunction order. U.S. Br. at 19-34. The preliminary injunction order only prevented Interior from enforcing the May Directive, and the record is clear that Interior did not enforce the May Directive after the issuance of the preliminary injunction. The district court thus erred when it held Interior in civil contempt and awarded attorneys' fees to Hornbeck on that basis.

A. The government at all times complied with the preliminary injunction order.

There was a short twenty-day period between the issuance of the preliminary injunction order on June 22, 2010, which prohibited Interior from enforcing the May Directive, and the issuance of the July Directive on July 12, 2010. Because deepwater operators did not immediately resume drilling in the days following the district court's

preliminary injunction order, Hornbeck speculates that Interior must have enforced the May Directive. Br. at 28. Beyond its own speculation, Hornbeck offers no evidence that Interior enforced the May Directive, let alone the kind of clear and convincing evidence that is necessary to support a contempt finding. *See Test Masters Servs. v. Singh*, 428 F.3d 559, 582 (5th Cir. 2005) (clear and convincing evidence must be "so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case"). Although Hornbeck attempts to make much of it, it is entirely unremarkable that deepwater drilling did not resume. Resumption of deepwater drilling is inherently a technically and logistically challenging endeavor that requires careful planning in all circumstance and, at the time the preliminary injunction was issued, both the operators and Interior were paying special attention to ensuring that all existing planning, safety and spill response requirements were being met.[1] Thus, the fact that drilling did not

[1] For example, the operators required time to comply with certain certification and other requirements that had been recommended in the report requested by the President entitled "Increased Safety Measures for Energy Development on the Outer Continental Shelf" (Safety Measures Report), dated May 27, 2010. R:66-109. Lessees had been

immediately resume was not because Interior enforced the May Directive, but because resumption of operations unavoidably takes time and there was insufficient time for the operators to resume drilling.

Lacking any evidence that Interior enforced the May Directive, Hornbeck argues that the sanction of civil contempt is nonetheless warranted given what the district court called the government's "dismissive conduct" that the court viewed as a "determined disregard" of the preliminary injunction order. The dismissive conduct, Hornbeck argues, is that Interior disagreed with the district court's order; made that disagreement known to the public; informed the public it would appeal the order and issue a new directive supported by additional evidence; and, in fact, issued a new directive without first asking the district court for permission. Br. at 23-24. But, as explained in the opening brief, this conduct -- which was authorized by Interior's

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informed of these increased safety requirements in a Notice to Lessees dated June 8, 2010 (NTL-05). These requirements were not at issue in the Hornbeck litigation and were completely unaffected by the district court's preliminary injunction. Although some of these requirements were later (in October of 2010) deemed to have been instituted without proper notice and comment, *Ensco Offshore Co. v. Salazar*, No. 10-1941, 2010 WL 4116892, at *4-5 (E.D. La. Oct. 19, 2010), they were in effect at the time of the preliminary injunction order and most are now incorporated into rules promulgated by Interior, *see* 30 C.F.R. Pt. 250.

statutory responsibility to maintain the safety and security of the Outer Continental Shelf -- cannot support a contempt finding because none of it violates the preliminary injunction order. U.S. Br. at 24-33.

Publicly expressing disapproval of and appealing a district court order is not improper and, more importantly, it is not prohibited by the preliminary injunction order. Publicly expressing an intention to, and exercising statutory authority to, issue a new suspension directive after addressing the procedural flaws that the district court identified in the May Directive is not improper and, more importantly, it is not barred by the preliminary injunction order. In the Outer Continental Shelf Lands Act (OCSLA), Congress entrusted the Secretary of the Interior with the authority to ensure the safety and security of the Outer Continental Shelf. *See* 43 U.S.C. §§ 1332, 1334. In issuing the July Directive, the Secretary acted on that authority during a time when a massive amount of oil was spilling, or had spilled, into the Gulf's waters. The preliminary injunction order did not, and indeed could not, prevent the Secretary from acting within his statutory authority. *See Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743, 2758 (2010) (holding that a

court abused its discretion when it enjoined an agency from issuing a new decision "pursuant to authority vested in the agency by law").

In short, the government did not violate the preliminary injunction order. The preliminary injunction order solely prohibited the government from enforcing the May Directive. R:2247. Immediately after the district court issued the preliminary injunction order, Interior notified all of its employees not to enforce the May Directive. R:2413. Interior thereafter notified the operators who had received suspension letters that the suspension no longer had legal effect, even though the preliminary injunction order itself did not require notice to be given to these operators. R:2414. Then, in July 2010, Interior withdrew the May Directive in its entirety, and replaced it with a new directive (the "July Directive") that more thoroughly explained the purpose and need for the suspension and was based on a more complete record as well as the "ever-growing evidence" of the need for a suspension. R:2256-57; 2411; RS2:232-60. As the district court concluded, this rescission of the May Directive had "administrative force," RS1:1237, and, as this Court confirmed, after that rescission, the May Directive was "legally and

practically dead," RS2:356-57.[2] The record thus is clear: At no time subsequent to the district court's preliminary injunction order did Interior enforce the May Directive.

B. None of the actions cited by Hornbeck violated the preliminary injunction order

1. *The preliminary injunction order did not require Interior to seek a remand, and federal agencies typically do not need to request a remand.*

As established in the government's opening brief, the preliminary injunction order did not require Interior to seek a remand before exercising the authority provided to it by Congress in OSCLA to manage the safety and security of the Outer Continental Shelf. U.S. Br. at 26-28. Hornbeck does not dispute the absence of this requirement in the order, but contends that a finding of contempt nevertheless is warranted because in failing to request a remand "Interior failed to follow proper procedure." Br. at 29-32. But even if Hornbeck were correct that Interior failed to follow a required procedure that would not

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[2] A recent Tenth Circuit decision in an unrelated matter confirms the correctness of this Court's conclusion that the rescission of the May Directive and the issuance of the procedurally distinct July Directive mooted the challenge to the May Directive. *See Wyoming v. Dep't of the Interior*, __F.3d__, 2012 WL 642126, *7-8 (10th Cir. Feb. 29, 2012).

justify a finding of contempt. "Contempt is committed only if a person violates a court order requiring in specific and definite language that a person do or refrain from doing an act." *Martin*, 959 F.2d at 47. Because neither the preliminary injunction order, nor any other court order, required Interior to request a remand before exercising its statutory authority to manage the Outer Continental Shelf, the absence of a remand request cannot serve as a basis for contempt. *Id.*

To the extent Hornbeck is arguing that the absence of a remand request is somehow akin to enforcing the May Directive, that argument is illogical. Hornbeck never explains how the absence of a remand request is related to, or somehow the equivalent of, enforcing the May Directive. It is not. Failing to request a remand is entirely different in kind than enforcing a drilling suspension under the May Directive.

Moreover, although it is irrelevant to a proper contempt analysis, Hornbeck is incorrect that "proper procedure" compels agencies to request a remand before revisiting a previous decision or issuing a new decision outside the context of a formal administrative adjudication. As explained in the opening brief, some statutes providing for judicial review of formal administrative adjudication (*i.e.*, those agency

proceedings required to be made on the record after notice and opportunity for hearing) include specific remand requirements. U.S. Br. at 27 n.5. Where a lawsuit is brought pursuant to one of these statutes with a specific remand provision, courts have required agencies to seek a remand before reopening formal administrative proceedings. *Id.*

Hornbeck nevertheless contends that "the general rule [is] that an agency decision that is under judicial review should not be reconsidered until the agency moves for remand, or for the court to hold the case in abeyance." Br. at 29. There is no such general rule. The Supreme Court directly and emphatically has rejected the notion that agencies must ask courts to remand or to hold a case in abeyance before they may reconsider their decisions. In *United States v. Benmar Transport & Leasing Corp.*, 444 U.S. 4 (1979), the Supreme Court specifically referred to Hornbeck's purported rule that agencies must ask courts to remand or to hold a case in abeyance before reconsidering their decisions as an "empty formality" that cannot be imposed on an agency "unless Congress chooses to" impose it. 444 U.S at 6-7 & n.*.

Contrary to Hornbeck's argument, the general rule is that absent "a specific statutory limitation, an administrative agency has the

inherent authority to reconsider its decisions." *Macktal v. Chao*, 286 F.3d 822, 825-26 (5th Cir. 2002).[3] Thus, unless Congress provides otherwise, an agency may reconsider a decision and issue a new one, even while litigation is pending and without seeking court approval.

As noted in the government's opening brief, the Supreme Court recently reconfirmed the viability of this principle in *Monsanto*. The respondents in *Monsanto* argued that the petitioners were not harmed by an injunction preventing a federal agency from partially deregulating genetically modified alfalfa while it prepared an environmental impact statement because, even in the absence of the injunction, "the case would have to be remanded to the agency" before such a "partial deregulation [could] occur." 130 S.Ct at 2753. The Supreme Court rejected the argument, noting that it did "not see why the District Court would have to remand the matter to the agency." *Id.*

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[3] *Macktal* states that the agency must give notice of its reconsideration and the reconsideration must occur within a reasonable time. *See* 286 F.3d at 826. It is apparent from a case on which *Macktal* relies that these notice and timeliness requirements must be based in statute. *Id.* (citing *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972) (noting the statutory origin of the notice and timeliness requirements)). To the extent any case holds otherwise, those holdings are inconsistent with and do not survive *Benmar Transport*.

at 2754. Tellingly, despite its prominent place in the opening brief, Hornbeck never distinguishes, or even mentions, *Monsanto*.

The general rule that agencies do not need to ask a court's permission to reconsider their decisions, or to exercise their ongoing statutory authority, is also prominent in *Am. Farm Lines v. Black Ball Freight Servs.*, 397 U.S. 532, 542 (1970). While Hornbeck cites *Am. Farm Lines* for the proposition that agencies must ask for a remand, Br. at 30, that case actually stands for the exact opposite proposition. There, the Supreme Court held that "it was ***not*** necessary for the [Interstate Commerce] Commission to seek permission of the court" before reopening administrative proceedings. *Id.* at 1294 (emphasis added). The Court noted that Congress sometimes curtails an agency's authority to act when a matter is pending before a court, but Congress did not do so in Interstate Commerce Act. *Id.* at 1293.

The Court in *Am. Farm Lines* further stated that an agency "is without power to act inconsistently with the Court's jurisdiction," *id.*, but, in context, it is clear that the Court meant an agency, in reconsidering its decision, cannot violate an existing court order. In *Am. Farm Lines,* a district judge had enjoined the operation of the

agency's first order. *Id.* at 1291. After being enjoined, the agency reopened the administrative proceedings, took additional evidence, and issued a new order. *Id.* A district judge subsequently enjoined the operation of the new order. *Id.* In concluding that the agency did ***not*** "act inconsistently with the Court's jurisdiction," the Court noted that the agency "did not interfere in the slightest with the court's protective order," because the agency's orders never took effect, contrary to the court's stay orders, and "the [first] stay order did not forbid it from" reopening agency proceedings and issuing a new order. *Id.* at 1294.

Here, as in *Am. Farm Lines*, Interior did not act "inconsistently with the Court's jurisdiction" in issuing the July Directive because that order did not require Interior to seek the court's permission before issuing a new directive and Interior never enforced the May Directive.

It also is noteworthy that cases like *Am. Farm Lines*, which discuss the circumstances where agencies must request a remand, occur in the context of formal administrative adjudications. So too do the other cases on which Hornbeck relies. For example, *Broussard v. U.S. Postal Serv.*, 674 F.2d 1103 (5th Cir. 1982), involved the review of a Civil Service Commission decision that the applicable statute required

be made on the record after notice and opportunity for hearing, *i.e.*, a formal administrative adjudication. *See* 5 U.S.C. §§ 7501, 7512, 7701 (1978) (Addendum (Add.) 4-8); 5 U.S.C. §§ 7513, 7701, 7703 (1982) (Add. 9-15). In a footnote in *Broussard*, this Court commented that "once a judicial suit is filed, an agency should not unilaterally reopen administrative proceedings--the agency should first ask the court to remand the case to it." 674 F.2d at 1108 n.4. This Court cited *Exxon Corp. v. Train*, 554 F.2d 1310, 1316 (5th Cir. 1977), and *Anchor Line Ltd. v. Federal Maritime Comm'n*, 299 F.2d 124, 125 (D.C. Cir. 1962).

Both *Exxon* and *Anchor Line* demonstrate that the requirement to seek a remand is unique to formal adjudication and that the remand requirement arises not from "empty formality" of the sort found invalid in *Benmar Transport*, but by statute. In *Exxon*, Exxon sought review, pursuant to the judicial review provision of the Clean Water Act, 33 U.S.C. § 1369, of an EPA decision to deny a permit modification. 554 F.2d at 1314-15. The Clean Water Act contains a specific remand provision, applicable to formal adjudications conducted under the Act, authorizing a court to remand to the agency "if any party applies to the court for leave to adduce additional evidence" and that party satisfies

certain standards. *Id.* at 1316 & n.11 (citing 33 U.S.C. § 1369(c)).[4] Thus, *Exxon* concerned review of a formal adjudication under the Clean Water Act, a statute with a specific remand provision. *Id.*

Anchor Line Ltd. also concerned review of a formal adjudication under a statute with a specific remand provision. 299 F.2d at 125. Before assessing penalties pursuant to the Shipping Act, the Federal Maritime Commission was required to hold a "full hearing" and make "written findings." 46 U.S.C. § 822-23 (1958) (Add. 1). Moreover, the statute in effect at the time that provided for judicial review of the Commission's orders required a party wanting to introduce "additional evidence" into the administrative proceeding to "apply to the court of appeals" for "leave to adduce additional evidence." *See* 5 U.S.C. §§ 1032, 1037(c) (1964) (Add. 2-3). If the party seeking to introduce additional evidence into the proceeding met certain standards, the statute provided for the court to order the agency to take additional evidence. *Id.* § 1037(c). Thus, *Anchor Line*, like *Exxon*, also concerned a

[4] *Exxon* also relied on cases concerning review of formal adjudication of Federal Maritime Commission or Federal Communication Commission actions brought pursuant to the Hobbs Act, or its precursor(s), that includes a specific provision suggesting the agency must seek a remand from the court before acting. *See* 28 U.S.C. §§ 2341(3)(A), 2347(c).

formal adjudication under a statute requiring the agency to request a remand before "adduc[ing] additional evidence." *Id.*

This case does not involve judicial review of formal adjudication brought under a statute like that in *Am. Farm Lines*, *Broussard*, *Exxon* or *Anchor Line*. Hornbeck identifies no statute requiring Interior's decision to suspend drilling to be made formally on the record after notice and a hearing, or any statute that requires the government to seek a remand. To suggest that Interior needed to seek a remand in the circumstances here misunderstands the relevant case law.

Put differently, the government did not reopen administrative proceedings because there were no formal administrative proceedings conducted or statutorily required. The May and July Directives were not issued pursuant to a formal adjudicatory process, but were distinct agency actions separately undertaken to protect public safety and to discharge Interior's ongoing management responsibilities under OCSLA in a time of national crisis. *See* 43 U.S.C. §§ 1334, 1338. Thus, this case is more like *Monsanto*, a case concerning an informal adjudication, where the Supreme Court noted that, even where a there is a final

judgment, a remand is not required before an agency exercises its statutory authority. *Monsanto*, 130 S.Ct. at 2753-54.

* * *

Ultimately, the exact circumstance in which the agency must ask for a remand from the court is irrelevant to proper contempt analysis. Even if a remand were required by some unstated legal principal outside of the preliminary injunction order, the appropriate remedy is not a finding of civil contempt because the order did not require Interior to seek a remand before issuing a new directive. The court erred in basing its contempt finding on the absence of a remand request.

2. The preliminary injunction order did not prohibit government officials from making statements.

As explained in the government's opening brief, the preliminary injunction order did not prohibit, nor likely could it have prohibited, the Secretary or any other government official from making public statements. U.S. Br. at 28-33. In times of national crisis, government officials need to be able to communicate to Congress and the public about a plan of action. Government speech is too important to silence. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467-68 (2009) (discussing importance and rationale for government speech doctrine).

Hornbeck does not dispute the potential chilling effect that upholding a contempt finding here could have on government officials trying to communicate to Congress and the public about a plan of action, particularly in emergency circumstances. But Hornbeck argues that "an agency, like any other enjoined party, can be held in contempt for written or spoken defiance of a judicial prohibition." Br. at 32. The fact is, however, there was *no* judicial prohibition on speech.

Admitting that the order "did not specifically prohibit" the statements made by the Secretary (Br. at 33), Hornbeck retreats to the notion from *Am. Airlines* that "[t]he district court need not anticipate every action to be taken in response to its order, nor spell out in detail the means in which its order must be effectuated." 228 F.3d at 578. Hornbeck, however, misunderstands the context of this quote. This quote refers to the flexibility that a court may give an enjoined party to "effectuate" a clearly defined end result. *Id.* It concerned an injunctive order that required a labor union to "take all reasonable steps" to end or prevent a "sick-out." *Id.* at 582. This Court approved of that order, inferring that this "take all reasonable steps" provision did not need to choreograph every step, because the court's desired end result was

sufficiently "definite and specific." *Id.* at 578. Thus, if the specified result was accomplished, *i.e.*, the sick out ended, the union complied no matter what means it used to accomplish that result.

Here, instead of a requirement to accomplish an end result like that in *Am. Airlines*, the district court imposed a very specific and limited prohibition against enforcing the May Directive. As should be clear by now, Interior never enforced the May Directive. Interior thus never engaged in the prohibited conduct, and it cannot be held in contempt. Contrary to Hornbeck's suggestion, a court cannot hold a party in contempt for so-called "dismissive conduct" that neither was required nor prohibited in a "definite and specific" court order, simply because a court when issuing an injunction may provide the enjoined party with some flexibility to accomplish the court's desired end result.

Indeed, Rule 65 demands that a court entering an injunction "state its terms specifically; and describe in reasonable detail . . . the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(B)-(C). If Hornbeck thought effectuating the district court's injunctive order required the district court to impose a prior restraint on the Secretary's speech and his ability to inform Congress and the public of his agency's

current position and future plans, it should have sought that relief in the first instance or requested the district court to amend its order to prevent the Secretary from making public statements or testifying before Congress to this effect. That would have allowed the district court to provide the Secretary with the notice required by Rule 65, and would have provided the government with an avenue to seek appellate review of what almost certainly would be an improper prior restraint on speech or, at the very least, an overly broad preliminary injunction.

Finally, Hornbeck notably never denies that the Secretary had the authority under OCSLA to issue a new directive. This retained authority is something Hornbeck never reconciles in its steadfast desire to have the courts punish the Secretary of the Interior for timely and truthfully informing the public and Congress of his agency's stance either that the first suspension must stay in place (at the time, assuming that this Court would grant a stay of or vacate the preliminary injunction), or that a new suspension directive must be prepared based on the "ever-growing evidence" of the need for a suspension. R:2256-57; 2411. These communications to Congress and the affected public about an agency's intention to exercise the authority

given to it by Congress should not be considered a basis for a contempt sanction. Keeping the agency's position and future intent hidden from the public makes little sense and contravenes sound public policy.

In sum, because the Secretary's statements and press release were not restricted by the preliminary injunction order, the district court erred in citing them as evidence of contempt.

3. The preliminary injunction order did not require Interior to provide notification of the order.

Hornbeck argues that Interior did not comply with the preliminary injunction order because it notified only the operators of 33 permitted wells of the injunction and not the operators of all 4,500 active leases in the Gulf's deepwater. Br. at 26-28. The district court did not include a lack of notification as a basis for its contempt finding, RS2:869, and rightfully so. The preliminary injunction order did not require any notice be given at all, but simply required Interior not to enforce the May Directive. If Hornbeck thought that notice was required to implement the order, the burden was on it, pursuant to Rule 65, to ask the district court to amend its order to include a notification requirement. In the absence of such a request and amended order, the government had no obligation to provide notice. That Interior

nevertheless provided notice and exceeded what the preliminary injunction order required of the agency is evidence of Interior's compliance with the order, not of a contumacious act.

Moreover, because not all operators who held leases were poised to drill or had active drilling operations at the time of the May Directive, Interior sent suspension letters only to those operators that were actively drilling or were poised to drill. While a Notice to Lessees was sent to all operators in the Gulf alerting them to the May Directive, it was the suspension letters themselves that were the implementing, enforceable documents. Thus, after the district court enjoined the May Directive, it was entirely appropriate that Interior provided written notice of the court's preliminary injunction order only to those operators who had received suspension letters from Interior. In regard to other lessees, Interior never took any action to enforce the May Directive either before or after the preliminary injunction order. As discussed, because the order provided only that Interior could not enforce the May Directive, the affirmative notification letters and withdrawal of the Notice of Lessees exceeded Interior's obligation under the order.

Again citing *Am. Airlines,* Hornbeck contends that an enjoined party's conduct satisfies the contempt standard for disobedience of a court order when its notification lacks authoritative force. As discussed, that case is clearly distinguishable. The order at issue in *Am. Airlines* required a labor union to "take all reasonable steps" to end or prevent a "sick-out." 228 F.3d at 582. The court found the communication from union leaders to the union members did not satisfy the order's "all reasonable steps" requirement because the communication was "so lacking in authoritative forcefulness that [it] either [was] not heard at all ... or [was] discounted as being merely stage lines parroted for the benefit of some later judicial review." *Id.* (quotation omitted). Here, by contrast, the preliminary injunction order did not contain a provision to "take all reasonable steps" or even a provision requiring Interior affirmatively to notify the operators of the court's order. R:2247. The order required *no* affirmative act at all. *Id.* It required Interior *not to take* action, and Interior took no action that violated the order. *Id.*

Far from enforcing the May Directive, the only act prohibited by the preliminary injunction order, Interior immediately informed all of its employees not to enforce the May Directive. R:2413. Interior then

explicitly notified those operators who had received suspension letters of the preliminary injunction order, even though the order itself did not require the government to provide any notice. R:2414. Interior ultimately rescinded the May Directive when it issued the July Directive. RS2:232-60. Interior did not violate the order.

C. The district court did not find bad faith, Hornbeck has failed to preserve a bad faith argument, and the government did not act in bad faith.

Hornbeck argues, in the alternative, that the attorneys' fees award may be affirmed on the independent ground that the government acted in bad faith. Br. at 34-36. But the bad faith argument is even less compelling than the contempt argument.

Initially, Hornbeck is incorrect that bad faith is an alternate or independent ground for affirming the district court's fees award. "In order to impose sanctions against [a party] under its inherent power, a court must make a specific finding that [the party] acted in 'bad faith.'" *Chaves v. M/V Medina Star*, 47 F.3d 153, 156 (5th Cir. 1995); *see also Kipps v. Caillier*, 197 F.3d 765, 770 (5th Cir. 1999). The district court, however, explicitly declined to make any specific bad faith finding.

RS2:869-70. Thus, the requisite fact-finding necessary to support an award of attorneys' fees based on bad faith is absent.

Perhaps because the district court declined to make a bad faith finding, Hornbeck does not explain the basis for its argument beyond stating in a single sentence that "[t]he same evidence" that supports a finding of contempt "equally supports" a finding of bad faith. Br. at 36. The standards for findings of bad faith, however, are different from the standards for contempt. *See In re Lehtinen*, 564 F.3d 1052, 1058 (9th Cir. 2009) (explaining differences between bad faith and civil contempt standards). Accordingly, Hornbeck's one sentence of argument does not preserve this issue for purposes of Rules 28(a)(9) and (b) of the Federal Rules of Appellate Procedure, which require its brief to state its "contentions and the reasons for them, with citations to the authorities and parts of the record on which appell[ees] rely." This Court deems arguments that do not comply with Rule 28 to be waived. *See Matter of T-H New Orleans Ltd. P'ship*, 116 F.3d 790, 796 (5th Cir. 1997).

In any event, no reasonable fact-finder could find the government acted in bad faith based on these facts. Like those for civil contempt, "[t]he standards for bad faith are necessarily stringent." *Batson v. Neal*

Spelce Assocs., 805 F.2d 546, 550 (5th Cir. 1986). A court has "inherent power" to award fees when it finds that a litigant has acted "in bad faith," but this power "must be exercised with restraint and discretion." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991). "A court should invoke its inherent power to award attorneys' fees only when it finds that 'fraud has been practiced upon it, or that the very temple of justice has been defiled.'" *Boland Marine & Mfg. Co. v. Rihner*, 41 F.3d 997, 1005 (5th Cir. 1995) (quoting *Chambers*, 501 U.S. at 46)).

The evidentiary standards that apply to bad faith determinations are similarly stringent. A court may consider "a party's conduct *in response* to a substantive claim, whether before or after an action is filed, but [a finding of bad faith] may not be based on a party's conduct *forming the basis* for that substantive claim." *Sanchez v. Rowe*, 870 F.2d 291, 295 (5th Cir. 1989) (emphasis in original); *see also Positive Software Solutions, Inc. v. New Century Mortg.* Corp., 619 F.3d 458, 463 (5th Cir. 2010) (holding that district court erred in using inherent power to sanction attorney for conduct occurring in arbitration). Any finding of bad faith, moreover, must be supported by "clear and convincing evidence." *Crowe*, 261 F.3d at 563.

As noted, Hornbeck contends that "[t]he same evidence" that supports a finding of contempt "equally supports" a finding of bad faith. Br. at 36. This evidence consists of Interior issuing and publicly announcing its intent to issue a new suspension directive based on a new record without first asking the district court to remand or to hold the case in abeyance. RS2:869. But not seeking a remand, even if one were required, is at most legal error that would affect the validity of the underlying action. That legal error should be addressed in a separate lawsuit challenging the new directive. *See Monsanto*, 130 S.Ct. at 2758, 2760 (noting that a separate APA lawsuit is the appropriate means of challenging a new decision). It is not, as alleged by Hornbeck, an act of bad faith. *See Sanchez*, 870 F.2d at 295. Similarly, the Secretary, in a time of national crisis, exercising the authority given to him by Congress in OCSLA to manage the safety and security of the Outer Continental Shelf, does not act in bad faith by issuing a new suspension directive or publicly announcing his intention to issue one. *See Chambers*, 501 U.S. at 46; *Boland Marine*, 41 F.3d at 1005. No reasonable fact-finder could find bad faith based on these facts.

CONCLUSION

For the foregoing reasons as well as those stated in the government's opening brief, this Court should reverse the district court and vacate the award of attorneys' fees.

Respectfully submitted,

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MARCH 2012
DJ # 90-1-18-13146

CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2012, the foregoing document was served on all parties or their counsel of record through CM/ECF.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) that this brief is proportionately spaced, has a typeface of 14 points or more and contains 5,914 words. I used Microsoft Word 2007.

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The Board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this chapter. (Sept. 7, 1916, ch. 451, § 22, 39 Stat. 736; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, ch. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104 (1), 305, 306, eff. May 24, 1950, 15 F. R. 3178, 64 Stat. 1274, 1277.)

REPEALS

For provisional repeal, see note preceding section 801 of this title.

TRANSFER OF FUNCTIONS

"Federal Maritime Board" and "Board" were substituted for "commission" (which had reference to the United States Maritime Commission) on authority of 1950 Reorg. Plan No. 21, set out as a note under section 1111 of this title.

All executive and administrative functions of the Maritime Commission were transferred to the Chairman of the Maritime Commission by 1949 Reorg. Plan No. 6, eff. Aug. 20, 1949, 14 F. R. 5228, 63 Stat. 1069. See note set out under section 1111 of this title.

"Commission," as formerly used in this section, which meant the United States Maritime Commission, originally read "board", meaning the United States Shipping Board. For dissolution of the Board and transfer of its functions to United States Maritime Commission by Ex. Ord. No. 6166 and act June 29, 1936, see note under section 804 of this title.

§ 822. Orders of Board made only after full hearing.

Orders of the Federal Maritime Board relating to any violation of this chapter shall be made only after full hearing, and upon a sworn complaint or in proceedings instituted of its own motion.

All orders of the Federal Maritime Board, other than for the payment of money, made under this chapter, as amended or supplemented, shall continue in force until its further order, or for a specified period of time, as shall be prescribed in the order, unless the same shall be suspended, or modified, or set aside by the Board, or be suspended or set aside by a court of competent jurisdiction. (Sept. 7, 1916, ch. 451, § 23, 39 Stat. 736; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, ch. 858, § 904, 49 Stat. 2016; Aug. 4, 1939, ch. 417, § 1, 53 Stat. 1182; 1950 Reorg. Plan No. 21, §§ 104 (1), 305, 306, eff. May 24, 1950, 15 F. R. 3178, 64 Stat. 1274, 1277.)

AMENDMENTS

1939—Act Aug. 4, 1939, amended section by removing the time limitation on orders, except for the payment of money.

REPEALS

For provisional repeal, see note preceding section 801 of this title.

TRANSFER OF FUNCTIONS

"Federal Maritime Board" and "Board" were substituted for "commission", "United States Maritime Commission" and "Commission", on authority of 1950 Reorg. Plan No. 21, set out as a note under section 1111 of this title.

All executive and administrative functions of the Maritime Commission were transferred to the Chairman of the Maritime Commission by 1949 Reorg. Plan No. 6, eff. Aug. 20, 1949, 14 F. R. 5228, 63 Stat. 1069. See note set out under section 1111 of this title.

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§ 823. Records of Board; copies; publication of reports; evidence.

The Federal Maritime Board shall enter of record a written report of every investigation made under this chapter in which a hearing has been held, stating its conclusions, decision, and order, and, if reparation is awarded, the findings of fact on which the award is made, and shall furnish a copy of such report to all parties to the investigation.

The Federal Maritime Board may publish such reports in the form best adapted for public information and use, and such authorized publications shall, without further proof or authentication, be competent evidence of such reports in all courts of the United States and of the States, Territories, Districts, and possessions thereof. (Sept. 7, 1916, ch. 451, § 24, 39 Stat. 736; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, ch. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104 (1), 305, 306, eff. May 24, 1950, 15 F. R. 3178, 64 Stat. 1274, 1277.)

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TRANSFER OF FUNCTIONS

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All executive and administrative functions of the Maritime Commission were transferred to the Chairman of the Maritime Commission by 1949 Reorg. Plan No. 6, eff. Aug. 20, 1949, 14 F. R. 5228, 63 Stat. 1069. See note set out under section 1111 of this title.

"Commission", as formerly used in this section, which meant the United States Maritime Commission, originally read "Board," meaning the United States Shipping Board. For dissolution of the Board and transfer of its functions to United States Maritime Commission by Ex. Ord. No. 6166 and act June 29, 1936, see note under section 804 of this title.

FEDERAL RULES OF CIVIL PROCEDURE

Effect of rule 44 on this section, see note by Advisory Committee under said rule 44, Title 28, Appendix, Judiciary and Judicial Procedure.

§ 824. Reversal, suspension, or modification of orders.

The Federal Maritime Board may reverse, suspend, or modify, upon such notice and in such manner as it deems proper, any order made by it. Upon application of any party to a decision or order it may grant a rehearing of the same or any matter determined therein, but no such application for or allowance of a rehearing shall, except by special order of the Board, operate as a stay of such order. (Sept. 7, 1916, ch. 451, § 25, 39 Stat. 736; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, ch. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 104 (1), 306, eff. May 24, 1950, 15 F. R. 3178, 64 Stat. 1274, 1277.)

REPEALS

For provisional repeal, see note preceding section 801 of this title.

TRANSFER OF FUNCTIONS

"Federal Maritime Board" and "Board" were substituted for "commission" (which had reference to the United States Maritime Commission) on authority of 1950 Reorg. Plan No. 21, set out as a note under section 1111 of this title.

All executive and administrative functions of the Maritime Commission were transferred to the Chairman of the Maritime Commission by 1949 Reorg. Plan No. 6,

Sec.
1039. Jurisdiction of proceeding.
(a) Exclusive.
(b) Stay or suspension of orders; interlocutory injunctions.
1040. Review in Supreme Court on certiorari or certification.
1041. Rules.
1042. Enforcement of orders by district courts.

§ 1031. Definitions.

As used in this chapter—

(a) "Court of appeals" means a court of appeals of the United States.

(b) "Clerk" means the clerk of the court in which the petition for the review of an order, reviewable under this chapter, is filed.

(c) "Petitioner" means the party or parties by whom a petition to review an order, reviewable under this chapter, is filed.

(d) When the order sought to be reviewed was entered by the Federal Communications Commission, "agency" means the Commission; when such order was entered by the Secretary of Agriculture, "agency" means the Secretary; when such order was entered by the United States Maritime Commission, or the Federal Maritime Board, or the Maritime Administration, "agency" means that Commission or Board, or Administration, as the case may require; when such order was entered by the Atomic Energy Commission, "agency" means that Commission. (Dec. 29, 1950, ch. 1189, § 1, 64 Stat. 1129; Aug. 30, 1954, ch. 1073, § 2 (a) 68 Stat. 961.)

AMENDMENTS

1954—Subsec. (d). Act Aug. 30, 1954, included the Atomic Energy Commission.

EFFECTIVE DATE

Section 14 of act Dec. 29, 1950, provided that: "This Act [this chapter] shall take effect on the thirtieth day after the date of its approval [Dec. 29, 1950]. However, actions to enjoin, set aside, or suspend orders of the Federal Communications Commission or the Secretary of Agriculture, or the United States Maritime Commission, the Federal Maritime Board, and the Maritime Administration which are pending when this Act [this chapter] becomes effective, shall not be affected thereby, but shall proceed to final disposition under the existing law."

REPEALS

Section 13 of act Dec. 29, 1950, provided that: "All laws or parts of laws inconsistent with the provisions of this Act [this chapter] are repealed."

ABOLITION OF FEDERAL MARITIME BOARD

Section 304 of 1961 Reorg. Plan No. 7, eff. Aug. 12, 1961, 26 F.R. 7315, 75 Stat. 840, set out as a note under section 1332–15 of this title, abolished the Federal Maritime Board, including the offices of the members of the Board. Functions of the Board were transferred either to the Federal Maritime Commission or to the Secretary of Commerce by sections 103 and 202 of 1961 Reorg. Plan No. 7.

§ 1032. Jurisdiction of courts of appeals.

The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders (a) of the Federal Communications Commission made reviewable in accordance with the provisions of section 402 (a) of Title 47, and (b) of the Secretary of Agriculture made under the Packers and Stockyards Act, 1921, as amended, and under the Perishable Agricultural Commodities Act, 1930, as amended, except orders issued under sections 210 (e), 217a, and 499g (a) of Title 7, and (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 830 of Title 46, and (d) of the Atomic Energy Commission made reviewable by section 2239 of Title 42.

Such jurisdiction shall be invoked by the filing of a petition as provided in section 1034 of this title. (Dec. 29, 1950, ch. 1189, § 2, 64 Stat. 1129; Aug. 30, 1954, ch. 1073, § 2 (b), 68 Stat. 961.)

REFERENCES IN TEXT

The Packers and Stockyards Act, 1921, as amended, referred to in the text, is classified to chapter 9 of Title 7, Agriculture.

The Perishable Agricultural Commodities Act, 1930, as amended, referred to in the text, is classified to chapter 20A of Title 7, Agriculture.

The Shipping Act, 1916, as amended, referred to in the text, is classified to chapter 23 of Title 46, Shipping.

The Intercoastal Shipping Act, 1933, as amended, referred to in the text, is classified to chapter 29A of Title 46, Shipping.

AMENDMENTS

1954—Act Aug. 30, 1954, added clause (d).

ABOLITION OF FEDERAL MARITIME BOARD

Section 304 of 1961 Reorg. Plan No. 7, eff. Aug. 12, 1961, 26 F.R. 7315, 75 Stat. 840, set out as a note under sections 1332–15 of this title, abolished the Federal Maritime Board, including the offices of the members of the Board. Functions of the Board were transferred either to the Federal Maritime Commission or to the Secretary of Commerce by sections 103 and 202 of 1961 Reorg. Plan No. 7.

CROSS REFERENCES

Secretary of Health, Education, and Welfare orders respecting approval of construction projects for State mental retardation facilities and community mental health centers, see section 2684 of Title 42, The Public Health and Welfare.

§ 1033. Venue.

The venue of any proceeding under this chapter shall be in the judicial circuit wherein is the residence of the party or any of the parties filing the petition for review, or wherein such party or any of such parties has its principal office, or in the United States Court of Appeals for the District of Columbia. (Dec. 29, 1950, ch. 1189, § 3, 64 Stat. 1130.)

§ 1034. Review of orders; time; notice; contents of petition; service.

Any party aggrieved by a final order reviewable under this chapter may, within sixty days after entry of such order, file in the court of appeals, wherein the venue as prescribed by section 1033 of this title lies, a petition to review such order. Upon the entry of such an order, notice thereof shall be given promptly by the agency by service or publication in accordance with the rules of such agency. The action in court shall be brought against the United States. The petition shall contain a concise statement of (a) the nature of the proceedings as to which review is sought, (b) the facts upon which venue is based, (c) the grounds on which relief is sought, and (d) the relief prayed. The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk

shall serve a true copy of the petition upon the agency and upon the Attorney General of the United States by mailing by registered mail, with request for return receipt, a true copy to the agency and a true copy to the Attorney General. (Dec. 29, 1950, ch. 1189, § 4, 64 Stat. 1130.)

§ 1035. Prehearing conference.

The court of appeals may hold a prehearing conference or direct a judge of such court to hold a prehearing conference. (Dec. 29, 1950, ch. 1189, § 5, 64 Stat. 1130.)

§ 1036. Record on review.

Unless the proceeding has been terminated on a motion to dismiss the petition, the ageney shall file in the office of the clerk of the court of appeals in which the proceeding is pending the record on review, as provided in section 2112 of Title 28. (Dec. 29, 1950, ch. 1189, § 6, 64 Stat. 1130; Aug. 28, 1958, Pub. L. 85–791, § 31 (a), 72 Stat. 951.)

AMENDMENTS

1958—Pub. L. 85–791 substituted "Unless" for "Within the time prescribed by, and in accordance with the requirements of, rules promulgated by the court of appeals in which the proceeding is pending, unless", and "of the court of appeals in which the proceeding is pending the record on review, as provided in section 2112 of Title 28" for "the record on review, duly certified, consisting of the pleadings, evidence, and proceedings before the agency, or such portions thereof as such rules shall require to be included in such record, or such portions thereof as the petitioner and the agency, with the approval of the court of appeals, shall agree upon in writing".

§ 1037. Petitions to review.

(a) Heard on record before respondent.

Petitions to review orders reviewable under this chapter, unless determined on a motion to dismiss the petition, shall be heard in the court of appeals upon the record of the pleadings, evidence adduced, and proceedings before the agency where the agency has in fact held a hearing whether or not required to do so by law.

(b) Procedure where no hearing held.

Where the agency has held no hearing prior to the taking of the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After such determination, the court shall (1) where a hearing is required by law, remand the proceedings to the agency for the purpose of holding a hearing; (2) where a hearing is not required by law, pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; and (3) where a hearing is not required by law, and a genuine issue of material fact is presented, transfer the proceedings to a United States district court for the district where the petitioner or any petitioner resides or has its principal office for hearing and determination as if such proceedings were originally initiated in the district court. The procedure in such cases in the United States district courts shall be governed by the Federal Rules of Civil Procedure.

(c) Additional evidence.

If a party to a proceeding to review shall apply to the court of appeals, in which the proceeding is pending, for leave to adduce additional evidence and shall show to the satisfaction of such court (1) that such additional evidence is material, and (2) that there were reasonable grounds for failure to adduce such evidence before the agency, such court may order such additional evidence and any counterevidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken and may modify or set aside its order and shall file in the court such additional evidence, such modified findings or new findings, and such modified order or the order setting aside the original order. (Dec. 29, 1950, ch. 1189, § 7, 64 Stat. 1130; Aug. 28, 1958, Pub. L. 85–791, § 31 (b), 72 Stat. 951.)

AMENDMENTS

1958—Subsec. (c). Pub. L. 85–791 substituted "in the court" for "a certified transcript of" in the second sentence.

§ 1038. Representation in proceeding; intervention.

The Attorney General shall be responsible for and have charge and control of the interests of the Government in all court proceedings authorized by this chapter. The agency, and any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review such order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the agency's order, may intervene in any proceeding to review such order. The Attorney General shall not dispose of or discontinue said proceeding to review over the objection of such party or intervenors aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said proceeding unaffected by the action or nonaction of the Attorney General therein. (Dec. 29, 1950, ch. 1189, § 8, 64 Stat. 1131.)

§ 1039. Jurisdiction of proceeding.

(a) Exclusive.

Upon the filing and service of a petition to review, the court of appeals shall have jurisdiction of the proceeding. The court of appeals in which the record on review is filed, on such filing, shall have jurisdiction to vacate stay orders or interlocutory injunctions theretofore granted by any court, and shall have exclusive jurisdiction to make and enter, upon the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

(b) Stay or suspension of orders; interlocutory injunctions.

The filing of the petition to review shall not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. Where the petitioner makes application for an interlocutory injunction suspending or restraining the enforcement, opera-

before August 1, 1947, from the government of a cobelligerent or neutral nation or an American Republic."

EX. ORD. NO. 11320. DELEGATION OF AUTHORITY

Ex. Ord. No. 11320, Dec. 12, 1966, 31 F.R. 15789, provided:

By virtue of the authority vested in me by Section 7 of the Foreign Gifts and Decorations Act of 1966 (Public Law 89-673; 80 Stat. 952) and Section 301 of Title 3 of the United States Code, and as President of the United States, it is ordered as follows:

The Secretary of State, and, when designated by the Secretary of State for such purpose, the Under Secretary of State, are hereby designated and empowered to exercise, without the approval, ratification, or other action of the President, the authority conferred upon the President by Section 7 of the Foreign Gifts and Decorations Act of 1966 to prescribe rules and regulations to carry out the purposes of that Act. Such rules and regulations shall be published in the Federal Register.

LYNDON B. JOHNSON.

EX ORD. NO. 11446. ACCEPTANCE OF SERVICE MEDALS AND RIBBONS FROM MULTILATERAL ORGANIZATIONS OTHER THAN UNITED NATIONS

Ex. Ord. No. 11446, Jan. 16, 1969, 34 F.R. 803, provided:

By virtue of the authority vested in me as President of the United States and as Commander in Chief of the Armed Forces of the United States, I hereby authorize the Secretary of Defense, with respect to members of the Army, Navy, Air Force, and Marine Corps, and the Secretary of Transportation, with respect to members of the Coast Guard when it is not operating as a service in the Navy, to prescribe regulations for the acceptance of medals and ribbons which are offered by multilateral organizations, other than the United Nations, to members of the Armed Forces of the United States in recognition of service conducted under the auspices of those organizations. A determination that service for a multilateral organization in a particular geographical area or for a particular purpose constitutes a justifiable basis for authorizing acceptance of the medal or ribbon offered to eligible members of the Armed Forces of the United States shall be made with the concurrence of the Secretary of State.

LYNDON B. JOHNSON.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 22 section 2458a.

SUBCHAPTER V—MISCONDUCT

§ 7351. Gifts to superiors

An employee may not—

(1) solicit a contribution from another employee for a gift to an official superior;

(2) make a donation as a gift to an official superior; or

(3) accept a gift from an employee receiving less pay than himself.

An employee who violates this section shall be removed from the service.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 527.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 113	R.S. § 1784.

The application of the section is confined to employees, since the President and Members of Congress, though officers, could not have been intended to be "summarily discharged", and members of uniformed services are not covered by this statute. In the last sentence, the word "removed" is substituted for "summarily discharged" because of the provisions of the Lloyd-LaFollette Act, 37 Stat. 555, as amended, and the Veterans' Preference Act of 1944, 58 Stat, 387, as amended, which are carried into this title.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

CROSS REFERENCES

Removals from competitive civil service only for cause, see section 7501 of this title.

§ 7352. Excessive and habitual use of intoxicants

An individual who habitually uses intoxicating beverages to excess may not be employed in the competitive service.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 527.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S.C Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 640	Jan. 16, 1883, ch. 27, § 8, 22 Stat. 406.

The word "employed" is substituted for "appointed to, or retained in" because it includes both.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

CHAPTER 75—ADVERSE ACTIONS

SUBCHAPTER I—COMPETITIVE SERVICE

Sec.
7501. Cause; procedure; exception.

SUBCHAPTER II—PREFERENCE ELIGIBLES

7511. Definitions.
7512. Cause; procedure; exception.

SUBCHAPTER III—HEARING EXAMINERS

7521. Removal.

SUBCHAPTER IV—NATIONAL SECURITY.

7531. Definitions.
7532. Suspension and removal.
7533. Effect on other statutes.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in section 3382 of this title; title 39 section 1005.

SUBCHAPTER I—COMPETITIVE SERVICE

§ 7501. Cause; procedure; exception

(a) An individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service.

(b) An individual in the competitive service whose removal or suspension without pay is sought is entitled to reasons in writing and to—

(1) notice of the action sought and of any charges preferred against him;

(2) a copy of the charges;

(3) a reasonable time for filing a written answer to the charges, with affidavits; and

(4) a written decision on the answer at the earliest practicable date.

Examination of witnesses, trial, or hearing is not required but may be provided in the discretion of the individual directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for and the order of removal or suspension without pay, and also the reasons for reduction in grade or pay, shall be made a part of the re-

cords of the employing agency, and, on request, shall be furnished to the individual affected and to the Civil Service Commission.

(c) This section applies to a preference eligible employee as defined by section 7511 of this title only if he so elects. This section does not apply to the suspension or removal of an employee under section 7532 of this title.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 527.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 652(a)	Aug. 24, 1912, ch. 389, § 6 (less proviso, and less last sentence), 37 Stat. 555. June 10, 1948, ch. 447 "Sec. 6(a)", 62 Stat. 354.

In subsection (c), the second sentence is added on authority of the first 9 words of former section 22-1, which is carried in part into section 7532.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

EXECUTIVE ORDER NO. 10987

Ex. Ord. No. 10987, Jan. 18, 1962, 27 F.R. 550, formerly set out as a note under this section, which related to agency systems for appeals from adverse action, was revoked by Ex. Ord. No. 11787, June 11, 1974, 39 F.R. 20675, set out as a note under section 7701 of this title.

CROSS REFERENCES

Elections and political campaigns, see section 7325 of this title.

Gifts to superiors, see section 7351 of this title.

Lobbying with appropriated funds, removal from office by superior officer, see section 1913 of Title 18, Crimes and Criminal Procedure.

Personnel of former Bureau of Marine Inspection and Navigation, and Bureau of Customs transferred to Coast Guard, retention of civil-service status and pay, see section 433 of Title 14, Coast Guard.

Political contributions, see section 7323 of this title.

Withholding pay, employees removed for cause, see section 5511 of this title.

SUBCHAPTER II—PREFERENCE ELIGIBLES

§ 7511. Definitions

For the purpose of this subchapter—

(1) "preference eligible employee" means a permanent or indefinite preference eligible who has completed a probationary or trial period as an employee of an Executive agency or as an individual employed by the government of the District of Columbia, but does not include an employee whose appointment is required by Congress to be confirmed by, or made with the advice and consent of, the Senate; and

(2) "adverse action" means a removal, suspension for more than 30 days, furlough without pay, or reduction in rank or pay.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 528; Pub. L. 94-183, § 2(30), Dec. 31, 1975, 89 Stat. 1058.)

HISTORICAL AND REVISION NOTES

The section is supplied on authority of sections 2, 14, and 20 of the Act of June 27, 1944, ch. 287, 58 Stat. 387, 390, and 391, which are carried into this title.

In paragraph (2), the word "removal" is coextensive with and substituted for "discharge".

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1975—Par. (1). Pub. L. 94-183 deleted "except an employee whose appointment is made under section 3311 of title 39" following "or made with the advice and consent of, the Senate".

CROSS REFERENCES

Preference eligible, see section 2108 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 7501, 7701 of this title; title 22 section 1438; title 32 section 709.

SECTION REFERRED TO IN D.C. CODE

This section is referred to in sections 31-1603, 31-1623 of the District of Columbia Code.

§ 7512. Cause; procedure; exception

(a) An agency may take adverse action against a preference eligible employee, or debar him for future appointment, only for such cause as will promote the efficiency of the service.

(b) A preference eligible employee against whom adverse action is proposed is entitled to—

(1) at least 30 days' advance written notice, except when there is reasonable cause to believe him guilty of a crime for which a sentence of imprisonment can be imposed, stating any and all reasons, specifically and in detail, for the proposed action;

(2) a reasonable time for answering the notice personally and in writing and for furnishing affidavits in support of the answer; and

(3) a notice of an adverse decision.

(c) This section does not apply to the suspension or removal of a preference eligible employee under section 7532 of this title.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 528.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 863 (1st 168 words).	June 27, 1944, ch. 287, § 14 (1st 168 words), 58 Stat. 390.)

The application of this section is covered by the definitions in sections 105, 2105, 2108, and 7511.

Subsection (b)(3) is added on authority of the last 24 words before the first proviso in former section 863, which is carried in part into this section and section 7701.

Subsection (c) is added on authority of the first 18 words of former section 22-1, which is carried in part into section 7532.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

CROSS REFERENCES

Lobbying with appropriated funds, removal from office by superior officer, see section 1913 of Title 18, Crimes and Criminal Procedure.

National Security Agency—

Board of appraisal, personnel appraisal not prerequisite to action under this section, see section 832 of Title 50, War and National Defense.

Employment, termination notwithstanding this section, see section 833 of Title 50.
Withholding pay, employees removed for cause, see section 5511 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 3315, 7701 of this title; title 22 section 1438; title 32 section 709.

SECTION REFERRED TO IN D.C. CODE

This section is referred to in sections 31-1603, 31-1623 of the District of Columbia Code.

SUBCHAPTER III—HEARING EXAMINERS

§ 7521. Removal

A hearing examiner appointed under section 3105 of this title may be removed by the agency in which he is employed only for good cause established and determined by the Civil Service Commission on the record after opportunity for hearing.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 528.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1010 (2d sentence).	June 11, 1946, ch. 324, § 11 (2d sentence), 60 Stat. 244.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

CROSS REFERENCES

Additional requirements imposed by statute or otherwise recognized by law not limited or repealed by this section, see section 559 of this title.
Civil Service Commission, investigations, reports, and regulations for purposes of this section as relating to hearing examiners, see section 1305 of this title.
Subsequent statutes to be held to supersede or modify this section only to the extent that they do so expressly, see section 559 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 559, 1305 of this title; title 15 section 1715; title 29 section 661; title 39 section 3601; title 42 sections 2000e-4, 3608.

SUBCHAPTER IV—NATIONAL SECURITY

§ 7531. Definitions

For the purpose of this subchapter, "agency" means—

(1) the Department of State;
(2) the Department of Commerce;
(3) the Department of Justice;
(4) the Department of Defense;
(5) a military department;
(6) the Coast Guard;
(7) the Atomic Energy Commission;
(8) the National Aeronautics and Space Administration; and
(9) such other agency of the Government of the United States as the President designates in the best interests of national security.

The President shall report any designation to the Committees on the Armed Services of the Congress.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 528.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 22-3	Aug. 26, 1950, ch. 823, § 3, 64 Stat. 477

Paragraphs (1)-(8) are supplied on authority of former section 22-1, which is carried in part into section 7532. The references to "the Foreign Service of the United States" and "several field services" are omitted as unnecessary since they are within the agencies concerned. The words "military departments" are substituted for the enumeration of the military departments in view of the definition of "military department" in section 102.
The reference to the National Security Resources Board is omitted as the Board was abolished by 1953 Reorg. Plan No. 3, § 6, eff. June 12, 1953, 67 Stat. 636.
Paragraph (9) is restated to conform to the style of this title.
Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

TRANSFER OF FUNCTIONS

The Atomic Energy Commission was abolished and all functions of the Commission, the Chairman, the members of the Commission, and the officers and components of the Commission were transferred to and vested in the Administrator of the Energy Research and Development Administration, with certain exceptions by Pub. L. 93-438, Oct. 11, 1974, 88 Stat. 1233. See section 5814 of Title 42, The Public Health and Welfare.

PANAMA CANAL AND PANAMA RAILROAD COMPANY

Ex. Ord. No. 10237, Apr. 27, 1951, 16 F.R. 3627, makes the provisions of former sections 22-1 and 22-3 of this title [see Distribution Tables] applicable to the Panama Canal Government and to the Panama Canal Company.

§ 7532. Suspension and removal

(a) Notwithstanding other statutes, the head of an agency may suspend without pay an employee of his agency when he considers that action necessary in the interests of national security. To the extent that the head of the agency determines that the interests of national security permit, the suspended employee shall be notified of the reasons for the suspension. Within 30 days after the notification, the suspended employee is entitled to submit to the official designated by the head of the agency statements or affidavits to show why he should be restored to duty.
(b) Subject to subsection (c) of this section, the head of an agency may remove an employee suspended under subsection (a) of this section when, after such investigation and review as he considers necessary, he determines that removal is necessary or advisable in the interests of national security. The determination of the head of the agency is final.
(c) An employee suspended under subsection (a) of this section who—

(1) has a permanent or indefinite appointment;
(2) has completed his probationary or trial period; and
(3) is a citizen of the United States;

is entitled, after suspension and before removal, to—

(A) a written statement of the charges against him within 30 days after suspension, which may be amended within 30 days there-

after and which shall be stated as specifically as security considerations permit;

(B) an opportunity within 30 days thereafter, plus an additional 30 days if the charges are amended, to answer the charges and submit affidavits;

(C) a hearing, at the request of the employee, by an agency authority duly constituted for this purpose;

(D) a review of his case by the head of the agency or his designee, before a decision adverse to the employee is made final; and

(E) a written statement of the decision of the head of the agency.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 529.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 22-1 (less 3d-5th provisos).	Aug. 26, 1950, ch. 803, § 1 (less 3d-5th provisos), 64 Stat. 476. July 29, 1958, Pub. L. 85-568, § 301(c), 72 Stat. 432.

The application of this section is covered by the definition in section 7531.

In subsection (a), the words "Notwithstanding the provisions of section 652 of this title" are omitted but are carried into section 7501(c). The words "in his absolute discretion" are omitted as unnecessary in view of the permissive grant of authority. The word "reinstated" is omitted as it is commonly used in other statutes to denote action different from that referred to here.

In subsections (b) and (c), the words "remove" and "removal" are coextensive with and substituted for "terminate the employment", "termination", and "employment is terminated", as appropriate.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

CROSS REFERENCES

National Security Agency—

Board of appraisal, personnel appraisal not prerequisite to action under this section, see section 832 of Title 50, War and National Defense.

Employment, termination notwithstanding this section, see section 833 of Title 50.

Restoration to duty of persons suspended or removed under this section, see section 3571 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 3571, 7312, 7501, 7512 of this title.

§ 7533. Effect on other statutes

This subchapter does not impair the powers vested in the Atomic Energy Commission by chapter 23 of title 42, or the requirement in section 2201(d) of title 42 that adequate provision be made for administrative review of a determination to dismiss an employee of the Atomic Energy Commission.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 529.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 22-2	Aug. 26, 1950, ch. 803, § 2, 64 Stat. 477.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

TRANSFER OF FUNCTIONS

The Atomic Energy Commission was abolished and all functions of the Commission, the Chairman, the members of the Commission, and the officers and components of the Commission were transferred to and vested in the Administrator of the Energy Research and Development Administration, with certain exceptions by Pub. L. 93-438, Oct. 11, 1974, 88 Stat. 1233. See section 5814 of Title 42, The Public Health and Welfare.

CHAPTER 77—APPEALS

Sec.
7701. Appeals of preference eligibles.

§ 7701. Appeals of preference eligibles

A preference eligible employee as defined by section 7511 of this title is entitled to appeal to the Civil Service Commission from an adverse decision under section 7512 of this title of an administrative authority so acting. The employee shall submit the appeal in writing within a reasonable time after receipt of notice of the adverse decision, and is entitled to appear personally or through a representative under regulations prescribed by the Commission. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority and shall send copies of the findings and recommendations to the appellant or his representative. The administrative authority shall take the corrective action that the Commission finally recommends.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 530.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 863 (less 1st 168 words, and less 2d proviso).	June 27, 1944, ch. 287, § 14 (less 1st 168 words, and less 2d proviso), 58 Stat. 390. Aug. 4, 1947, ch. 447, 61 Stat. 723.
.....	5 U.S.C. 868 (proviso).	June 22, 1948, ch. 604, 62 Stat. 575.

The application of the section is established by the words "A preference eligible employee as defined by section 7511 of this title". Specific mention of the actions appealable are covered by the reference to "an adverse decision under section 7512 of this title". The words "administrative authority" are substituted for "administrative officer" to avoid conflict with the definitions of "employee" and "officer" in chapter 21 of this title and to include an individual who is employed by the government of the District of Columbia or who is a member of a uniformed service as such an individual could have been an "administrative officer" under former section 863. The words "the date of" in the phrase "after the date of receipt of notice" are omitted as unnecessary. The words "reasonable rules and" in the phrase "reasonable rules and regulations" are omitted as unnecessary. The word "proper" in the phrase "proper administrative officer" is omitted as unnecessary. The word "designated" in the phrase "designated representative" is omitted as unnecessary.

Standard changes are made to conform with the definitions applicable and the style of this title outlined in preface to the report.

EX. ORD. NO. 11787. APPEALS SYSTEM FOR EMPLOYEES

Ex. Ord. No. 11787, June 11, 1974, 39 F.R. 20675, provided:

By virtue of the authority vested in me by the Constitution and statutes of the United States, including

sections 3301 and 7301 of title 5 of the United States Code, and as President of the United States, it is ordered as follows:

SECTION 1. Except when otherwise provided by statute, the appeals system established by the Civil Service Commission under chapter 77 of title 5 of the United States Code [this chapter], and section 22 of the Executive Order No. 11491 of October 29, 1969 [set out as a note under section 7301 of this title], shall constitute the sole system of appeal for an employee who is covered by that appeals system.

SEC. 2. Executive Order No. 10987, relating to agency systems for appeals from adverse action, is revoked.

SEC. 3. This order shall be effective on the 90th day after issuance and shall apply to all adverse actions effective on and after that day. However, an appeal timely filed from an adverse action effective prior to that day under an agency appeals system established pursuant to Executive Order No. 10987 shall be processed to completion under that system.

RICHARD NIXON.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 22 section 1438.

SECTION REFERRED TO IN D.C. CODE

This section is referred to in sections 31-1603, 31-1623 of the District of Columbia Code.

CHAPTER 79—SERVICES TO EMPLOYEES

Sec.
7901. Health service programs.
7902. Safety programs.
7903. Protective clothing and equipment.

§ 7901. Health service programs

(a) The head of each agency of the Government of the United States may establish, within the limits of appropriations available, a health service program to promote and maintain the physical and mental fitness of employees under his jurisdiction.

(b) A health service program may be established by contract or otherwise, but only—

(1) after consultation with the Secretary of Health, Education, and Welfare and consideration of its recommendations; and

(2) in localities where there are a sufficient number of employees to warrant providing the service.

(c) A health service program is limited to—

(1) treatment of on-the-job illness and dental conditions requiring emergency attention;

(2) preemployment and other examinations;

(3) referral of employees to private physicians and dentists; and

(4) preventive programs relating to health.

(d) The Secretary of Health, Education, and Welfare, on request, shall review a health service program conducted under this section and shall submit comment and recommendations to the head of the agency concerned.

(e) When this section authorizes the use of the professional services of physicians, that authorization includes the use of the professional services of surgeons and osteopathic practitioners within the scope of their practice as defined by State law.

(f) The health programs conducted by the following agencies are not affected by this section—

(1) the Tennessee Valley Authority;

(2) the Canal Zone Government; and

(3) the Panama Canal Company.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 530; Pub. L. 90-83, § 1(47), Sept. 11, 1967, 81 Stat. 209.)

HISTORICAL AND REVISION NOTES

1966 ACT

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 150	Aug. 8, 1946, ch. 865, 60 Stat. 903. Sept. 23, 1950, ch. 1010, § 8, 64 Stat. 986.

In subsection (a), the words "agency of the Government of the United States" are coextensive with and substituted for "departments and agencies including Government-owned and controlled corporations" to avoid confusion with the definitions in sections 101-105.

In subsection (d) the word "appropriate" in the phrase "appropriate comment and recommendations" is omitted as unnecessary. The words "to the head of the agency concerned" are added for clarity.

In subsection (e), the substance of the definition of "physician" in former section 790 is substituted for the reference to that section.

In subsection (f) (2) and (3), the words "Canal Zone Government" and "Panama Canal Company" are substituted for "Panama Canal" and "Panama Railroad", respectively, on the authority of the Act of Sept. 26, 1950, ch. 1049, § 2(a), 64 Stat. 1038.

The last proviso of the first sentence of the Act of Aug. 8, 1946, is omitted as executed.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

1967 ACT

This section amends 5 U.S.C. 7901 to reflect 1966 Reorganization Plan No. 3, effective June 25, 1966, 80 Stat. 1610, section 1 of which transferred all functions of the Public Health Service to the Secretary of Health, Education, and Welfare.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 50 section 403j.

§ 7902. Safety programs

(a) For the purpose of this section—

(1) "employee" means an employee as defined by section 8101 of this title; and

(2) "agency" means an agency in any branch of the Government of the United States, including an instrumentality wholly owned by the United States, and the government of the District of Columbia.

(b) The Secretary of Labor shall carry out a safety program under section 941(b)(1) of title 33 covering the employment of each employee of an agency.

(c) The President may—

(1) establish by Executive order a safety council composed of representatives of the agencies and of labor organizations representing employees to serve as an advisory body to the Secretary in furtherance of the safety program carried out by the Secretary under subsection (b) of this section; and

(2) undertake such other measures as he considers proper to prevent injuries and accidents to employees of the agencies.

(d) The head of each agency shall develop and support organized safety promotion to reduce accidents and injuries among employees

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in section 7541 of this title.

§ 7511. Definitions; application

(a) For the purpose of this subchapter—

(1) "employee" means—

(A) an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less; and

(B) a preference eligible in an Executive agency in the excepted service, and a preference eligible in the United States Postal Service or the Postal Rate Commission, who has completed 1 year of current continuous service in the same or similar positions;

(2) "suspension" has the meaning as set forth in section 7501(2) of this title;

(3) "grade" means a level of classification under a position classification system;

(4) "pay" means the rate of basic pay fixed by law or administrative action for the position held by an employee; and

(5) "furlough" means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

(b) This subchapter does not apply to an employee—

(1) whose appointment is made by and with the advice and consent of the Senate;

(2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by—

(A) the Office of Personnel Management for a position that it has excepted from the competitive service; or

(B) the President or the head of an agency for a position which is excepted from the competitive service by statute.

(c) The Office may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office.

(Added Pub. L. 95–454, title II, § 204(a), Oct. 13, 1978, 92 Stat. 1135.)

PRIOR PROVISIONS

A prior section 7511, Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 528; Pub. L. 94–183, § 2(30), Dec. 31, 1975, 89 Stat. 1058, which defined the terms "preference eligible employee" and "adverse action" for purposes of this subchapter, was repealed by Pub. L. 95–454, § 204(a).

EFFECTIVE DATE

Subchapter effective 90 days after Oct. 13, 1978, see section 907 of Pub. L. 95–454, set out as an Effective Date of 1978 Amendment note under section 1101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 22 section 1438; title 32 section 709; title 38 sections 106, 4202.

§ 7512. Actions covered

This subchapter applies to—

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to—

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1208 or 7521 of this title.

(Added Pub. L. 95–454, title II, § 204(a), Oct. 13, 1978, 92 Stat. 1136.)

PRIOR PROVISIONS

A prior section 7512, Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 528, which related to adverse action against a preference eligible employee and procedures applicable to such adverse action, was repealed by Pub. L. 95–454, § 204(a).

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 3315, 7121 of this title; title 22 section 1438; title 32 section 709.

§ 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter,

together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

(Added Pub. L. 95-454, title II, § 204(a), Oct. 13, 1978, 92 Stat. 1136.)

§ 7514. Regulations

The Office of Personnel Management may prescribe regulations to carry out the purpose of this subchapter, except as it concerns any matter with respect to which the Merit Systems Protection Board may prescribe regulations.

(Added Pub. L. 95-454, title II, § 204(a), Oct. 13, 1978, 92 Stat. 1137.)

SUBCHAPTER III—ADMINISTRATIVE LAW JUDGES

AMENDMENTS

1978—Pub. L. 95-454, title II, § 204(a), Oct. 13, 1978, 92 Stat. 1137, in the subchapter heading substituted "Administrative law judges" for "Hearing examiners".

§ 7521. Actions against administrative law judges

(a) An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

(b) The actions covered by this section are—

(1) a removal;

(2) a suspension;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but do not include—

(A) a suspension or removal under section 7532 of this title;

(B) a reduction-in-force action under section 3502 of this title; or

(C) any action initiated under section 1206 of this title.

(Added Pub. L. 95-454, title II, § 204(a), Oct. 13, 1978, 92 Stat. 1137.)

PRIOR PROVISIONS

A prior section 7521, Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 528; Pub. L. 95-251, § 2(a)(1), Mar. 27, 1978, 92 Stat. 183, which related to removal of an administrative law judge appointed under section 3105 of this title, was repealed by Pub. L. 95-454, § 204(a).

EFFECTIVE DATE

Section effective 90 days after Oct. 13, 1978, see section 907 of Pub. L. 95-454, set out as an Effective Date of 1978 Amendment note under section 1101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 559, 1306, 7502, 7512 of this title; title 15 section 1715; title 29 section 661; title 30 section 823; title 39 section 3601; title 42 sections 2000e-4, 3608.

SUBCHAPTER IV—NATIONAL SECURITY

§ 7531. Definitions

For the purpose of this subchapter, "agency" means—

(1) the Department of State;

(2) the Department of Commerce;

(3) the Department of Justice;

(4) the Department of Defense;

(5) a military department;

(6) the Coast Guard;

(7) the Atomic Energy Commission;

(8) the National Aeronautics and Space Administration; and

(9) such other agency of the Government of the United States as the President designates in the best interests of national security.

The President shall report any designation to the Committees on the Armed Services of the Congress.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 528.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 22-3.	Aug. 26, 1950, ch. 823, § 3, 64 Stat. 477

Paragraphs (1)-(8) are supplied on authority of former section 22-1, which is carried in part into section 7532. The references to "the Foreign Service of the United States" and "several field services" are omitted as unnecessary since they are within the agencies concerned. The words "military departments" are substituted for the enumeration of the military departments in view of the definition of "military department" in section 102.

The reference to the National Security Resources Board is omitted as the Board was abolished by 1953 Reorg. Plan No. 3, § 6, eff. June 12, 1953, 67 Stat. 636.

Paragraph (9) is restated to conform to the style of this title.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

ABOLITION OF THE ATOMIC ENERGY COMMISSION

The Atomic Energy Commission was abolished and all functions were transferred to the Administrator of the Energy Research and Development Administration (unless otherwise specifically provided) by section 5814 of Title 42, The Public Health and Welfare. The Energy Research and Development Administration was terminated and functions vested by law in the Administrator thereof were transferred to the Secretary of Energy (unless otherwise specifically provided) by sections 7151(a) and 7293 of Title 42.

PANAMA CANAL AND PANAMA RAILROAD COMPANY

Ex. Ord. No. 10237, Apr. 27, 1951, 16 F.R. 3627, made the provisions of former sections 22-1 and 22-3 of this title [see Disposition Table preceding section 101 of this title] applicable to the Panama Canal Government and to the Panama Canal Company.

§ 7532. Suspension and removal

(a) Notwithstanding other statutes, the head of an agency may suspend without pay an employee of his agency when he considers that action necessary in the interests of national security. To the extent that the head of the

(Added Pub. L. 95-454, title IV, § 411(2), Oct. 13, 1978, 92 Stat. 1174.)

EFFECTIVE DATE

Subchapter effective 9 months after Oct. 13, 1978, and congressional review of provisions of sections 401 through 412 of Pub. L. 95-454, see section 415 of Pub. L. 95-454, set out as an Effective Date note under section 3131 of this title.

§ 7542. Actions covered

This subchapter applies to a removal from the civil service or suspension for more than 14 days, but does not apply to an action initiated under section 1206 of this title, to a suspension or removal under section 7532 of this title, or to a removal under section 3592 or 3595 of this title.

(Added Pub. L. 95-454, title IV, § 411(2), Oct. 13, 1978, 92 Stat. 1174, and amended Pub. L. 97-35, title XVII, § 1704(d)(1), Aug. 13, 1981, 95 Stat. 758.)

AMENDMENTS

1981—Pub. L. 97-35 added reference to section 3595 of this title.

EFFECTIVE DATE OF 1981 AMENDMENT

Amendment by Pub. L. 97-35 effective June 1, 1981, with certain exceptions and conditions, see section 1704(e) of Pub. L. 97-35, set out as an Effective Date note under section 3595 of this title.

§ 7543. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for misconduct, neglect of duty, or malfeasance.

(b) An employee against whom an action covered by this subchapter is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment can be imposed, stating specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, and a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Merit Systems Protection Board upon its request and to the employee affected upon the employee's request.

(Added Pub. L. 95-454, title IV, § 411(2), Oct. 13, 1978, 92 Stat. 1174, and amended Pub. L. 97-35, title XVII, § 1704(d)(2), Aug. 13, 1981, 95 Stat. 758.)

AMENDMENTS

1981—Subsec. (a). Pub. L. 97-35 substituted "misconduct, neglect of duty, or malfeasance" for "such cause as will promote the efficiency of the service".

EFFECTIVE DATE OF 1981 AMENDMENT

Amendment by Pub. L. 97-35 effective June 1, 1981, with certain exceptions and conditions, see section 1704(e) of Pub. L. 97-35, set out as an Effective Date note under section 3595 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 3393 of this title; title 10 section 1601; title 31 section 733.

CHAPTER 77—APPEALS

Sec.
7701. Appellate procedures.
7702. Actions involving discrimination.
7703. Judicial review of decisions of the Merit Systems Protection Board.

AMENDMENTS

1978—Pub. L. 95-454, title II, § 205, Oct. 13, 1978, 92 Stat. 1138, in item 7701 substituted "Appellate procedures" for "Appeals of preference eligibles", and added items 7702 and 7703.

§ 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d)(1) In any case in which—

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless—

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may—

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently,

if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(k)).

(h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i)(1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding calendar year, the number of appeals on which it completed action during that year, and the number of instances during that year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

(3) The Board shall by rule indicate any other category of significant Board action

which the Board determines should be subject to the provisions of this subsection.

(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(j) The Board may prescribe regulations to carry out the purpose of this section.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 530; Pub. L. 95-454, title II, § 205, Oct. 13, 1978, 92 Stat. 1138; Pub. L. 96-54, § 2(a)(45), Aug. 14, 1979, 93 Stat. 384.)

HISTORICAL AND REVISION NOTES

Derivation	U.S. Code	Revised Statutes and Statutes at Large
	5 U.S.C. 863 (less 1st 168 words, and less 2d proviso).	June 27, 1944, ch. 287, § 14 (less 1st 168 words, and less 2d proviso), 58 Stat. 390.
		Aug. 4, 1947, ch. 447, 61 Stat. 723.
	5 U.S.C. 868 (proviso).	June 22, 1948, ch. 604, 62 Stat. 575.

The application of the section is established by the words "A preference eligible employee as defined by section 7511 of this title". Specific mention of the actions appealable are covered by the reference to "an adverse decision under section 7512 of this title". The words "administrative authority" are substituted for "administrative officer" to avoid conflict with the definitions of "employee" and "officer" in chapter 21 of this title and to include an individual who is employed by the government of the District of Columbia or who is a member of a uniformed service as such an individual could have been an "administrative officer" under former section 863. The words "the date of" in the phrase "after the date of receipt of notice" are omitted as unnecessary. The words "reasonable rules and" in the phrase "reasonable rules and regulations" are omitted as unnecessary. The word "proper" in the phrase "proper administrative officer" is omitted as unnecessary. The word "designated" in the phrase "designated representative" is omitted as unnecessary.

Standard changes are made to conform with the definitions applicable and the style of this title outlined in preface to the report.

REFERENCES IN TEXT

The civil service law, referred to in subsecs. (d) and (e)(2), is set out in this title. See, particularly, section 3301 et seq. of this title.

AMENDMENTS

1978—Subsec. (e)(1). Pub. L. 96-54, § 2(a)(45)(A), substituted "administrative" for "administration".

Subsec. (g)(1). Pub. L. 96-54, § 2(a)(45)(B), substituted "(as the case may be)" for ", as the case may be,".

Subsec. (h). Pub. L. 96-54, § 2(a)(45)(C), substituted "subsection (e)" for "subsection (d)".

1978—Pub. L. 95-454 substituted in the section catchline "Appellate procedures" for "Appeals of preference eligibles" and substituted provisions relating to procedures applicable with respect to the Merit Systems Protection Board for an employee or applicant for employment, for provisions relating to appeals of preference eligible employees.

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96-54 effective July 12, 1979, see section 2(b) of Pub. L. 96-54, set out as an Effective Date of 1979 Amendment note under section 305 of this title.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95-454 effective 90 days after Oct. 13, 1978, see section 907 of Pub. L. 95-454, set out as an Effective Date of 1978 Amendment note under section 1101 of this title.

EX. ORD. NO. 11787. APPEALS SYSTEM FOR EMPLOYEES

Ex. Ord. No. 11787, June 11, 1974, 39 F.R. 20675; Ex. Ord. No. 12107, Dec. 28, 1978, 44 F.R. 1055, provided:

By virtue of the authority vested in me by the Constitution and statutes of the United States, including sections 3301 and 7301 of title 5 of the United States Code, and as President of the United States, it is ordered as follows:

SECTION 1. Except when otherwise provided by statute, the appeals system established by the Merit Systems Protection Board under chapter 77 of title 5 of the United States Code [this chapter], and section 22 of the Executive Order No. 11491 of October 29, 1969 [set out as a note under section 7101 of this title], shall constitute the sole system of appeal for an employee who is covered by that appeals system.

SEC. 2. Executive Order No. 10987, relating to agency systems for appeals from adverse action, is revoked.

SEC. 3. This order shall be effective on the 90th day after issuance and shall apply to all adverse actions effective on and after that day. However, an appeal timely filed from an adverse action effective prior to that day under an agency appeals system established pursuant to Executive Order No. 10987 shall be processed to completion under that system.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1206, 3592, 3593, 3595, 4303, 5596, 7121, 7513, 7543, 7702, 7703, 8347 of this title; title 22 sections 1438, 4137; title 31 section 753; title 38 sections 106, 4202.

§ 7702. Actions involving discrimination

(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who—

(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination prohibited by—

(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16),

(ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),

(iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),

(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or

(v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph,

the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section.

(2) In any matter before an agency which involves—

(A) any action described in paragraph (1)(A) of this subsection; and

(B) any issue of discrimination prohibited under any provision of law described in paragraph (1)(B) of this subsection;

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(ii) one member of the Board designated by the Chairman of the Board each time a panel is convened; and

(iii) one member of the Commission designated by the Chairman of the Commission each time a panel is convened.

The chairman of the special panel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

(B) The chairman is entitled to pay at a rate equal to the maximum annual rate of basic pay payable under the General Schedule for each day he is engaged in the performance of official business on the work of the special panel.

(C) The Board and the Commission shall provide such administrative assistance to the special panel as may be necessary and, to the extent practicable, shall equally divide the costs of providing the administrative assistance.

(e)(1) Notwithstanding any other provision of law, if at any time after—

(A) the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is not judicially reviewable action under this section or an appeal under paragraph (2) of this subsection;

(B) the 120th day following the filing of an appeal with the Board under subsection (a)(1) of this section, there is no judicially reviewable action (unless such action is not as the result of the filing of a petition by the employee under subsection (b)(1) of this section); or

(C) the 180th day following the filing of a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, there is no final agency action under subsection (b), (c), or (d) of this section;

an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), or section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)).

(2) If, at any time after the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action, the employee may appeal the matter to the Board under subsection (a)(1) of this section.

(3) Nothing in this section shall be construed to affect the right to trial de novo under any provision of law described in subsection (a)(1) of this section after a judicially reviewable action, including the decision of an agency under subsection (a)(2) of this section.

(f) In any case in which an employee is required to file any action, appeal, or petition under this section and the employee timely files the action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency.

(Added Pub. L. 95-454, title II, § 205, Oct. 13, 1978, 92 Stat. 1140, and amended Pub. L. 96-54, § 2(a)(46), Aug. 14, 1979, 93 Stat. 384.)

REFERENCES IN TEXT

The civil service law, referred to in subsec. (c)(2), is set out in this title. See, particularly, section 3301 et seq. of this title. The General Schedule, referred to in subsec. (d)(6)(B), is set out under section 5332 of this title.

AMENDMENTS

1979—Subsec. (a)(1)(A). Pub. L. 96-54, § 2(a)(46)(A), substituted "affected" for "effected".

Subsec. (a)(1)(B)(i). Pub. L. 96-54, § 2(a)(46)(B), substituted "2000e-16" for "2000e-16c".

Subsec. (e)(1). Pub. L. 96-54, § 2(a)(46)(C), (D), substituted "of this section" for "of this title" in subpar. (C), and "216(b)" for "216(d)" in provision following subpar. (C).

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96-54 effective July 12, 1979, see section 2(b) of Pub. L. 96-54, set out as an Effective Date of 1979 Amendment note under section 305 of this title.

EFFECTIVE DATE

Section effective 90 days after Oct. 13, 1978, see section 907 of Pub. L. 95-454, set out as an Effective Date of 1978 Amendment note under section 1101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 7121, 7701, 7703 of this title; title 31 section 783.

§ 7703. Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision issued by the Board under section 7701. In review of a final order or decision issued under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed

within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

(Added Pub. L. 95-454, title II, § 205, Oct. 13, 1978, 92 Stat. 1143, and amended Pub. L. 97-164, title I, § 144, Apr. 2, 1982, 96 Stat. 45.)

REFERENCES IN TEXT

The civil service law, referred to in subsec. (d), is set out in this title. See, particularly, section 3301 et seq. of this title.

AMENDMENTS

1982—Subsec. (b)(1). Pub. L. 97-164, § 144(1), substituted "United States Court of Appeals for the Federal Circuit" for "Court of Claims or a United States court of appeals as provided in chapters 91 and 158, respectively, of title 28".

Subsec. (c). Pub. L. 97-164, § 144(2), substituted "Court of Appeals for the Federal Circuit" for "Court of Claims or a United States court of appeals".

Subsec. (d). Pub. L. 97-164, § 144(3), substituted "United States Court of Appeals for the Federal Circuit" for "United States Court of Appeals for the District of Columbia".

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE

Section effective 90 days after Oct. 13, 1978, see section 907 of Pub. L. 95-454, set out as an Effective Date of 1978 Amendment note under section 1101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 7121, 8347 of this title; title 28 section 2342.

CHAPTER 79—SERVICES TO EMPLOYEES

Sec.
7901. Health service programs.
7902. Safety programs.
7903. Protective clothing and equipment.

§ 7901. Health service programs

(a) The head of each agency of the Government of the United States may establish, within the limits of appropriations available, a health service program to promote and maintain the physical and mental fitness of employees under his jurisdiction.

(b) A health service program may be established by contract or otherwise, but only—

(1) after consultation with the Secretary of Health, Education, and Welfare and consideration of its recommendations; and

(2) in localities where there are a sufficient number of employees to warrant providing the service.

(c) A health service program is limited to—

(1) treatment of on-the-job illness and dental conditions requiring emergency attention;

(2) preemployment and other examinations;

(3) referral of employees to private physicians and dentists; and

(4) preventive programs relating to health.

(d) The Secretary of Health, Education, and Welfare, on request, shall review a health service program conducted under this section and shall submit comment and recommendations to the head of the agency concerned.

(e) When this section authorizes the use of the professional services of physicians, that authorization includes the use of the professional services of surgeons and osteopathic practitioners within the scope of their practice as defined by State law.

(f) The health programs conducted by the following agencies are not affected by this section—

(1) the Tennessee Valley Authority;

(2) the Canal Zone Government; and

(3) the Panama Canal Company.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 530; Pub. L. 90-83, § 1(47), Sept. 11, 1967, 81 Stat. 209.)

HISTORICAL AND REVISION NOTES

1966 ACT

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 150.	Aug. 8, 1946, ch. 868, 60 Stat. 903. Sept. 23, 1959, ch. 1010, § 8, 84 Stat. 988.

In subsection (a), the words "agency of the Government of the United States" are coextensive with and substituted for "departments and agencies including